

1
2
3
4
5
6 AMERICAN CIVIL LIBERTIES UNION
7 OF NORTHERN CALIFORNIA,

8 Plaintiff,

9 v.

10 DEPARTMENT OF JUSTICE,

11 Defendant.

12 Case No. 13-cv-03127-MEJ

13
14 **ORDER RE: CROSS-MOTIONS FOR**
15 **SUMMARY JUDGMENT**

16 Re: Dkt. Nos. 35, 36

17
18 **INTRODUCTION**

19 Plaintiff American Civil Liberties Union (the “ACLU”) filed this lawsuit under the
20 Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking to compel the release of records
21 concerning the federal Government’s use of mobile tracking technology known as a cell site
22 simulator¹ or “CSS.” Compl. ¶ 1, Dkt. No. 1. Pending before the Court are the parties’ cross-
23 motions for summary judgment. Dkt. No. 35 (“Gov. Mot.”); Dkt. No. 36 (“Pl. Mot.”). Having
24 considered the parties’ positions, relevant legal authority, and the record in this case, the Court
25 **GRANTS IN PART** and **DENIES IN PART** the Government’s Motion and **GRANTS IN PART**
26 and **DENIES IN PART** the ACLU’s Motion for the reasons set forth below.

27
28 **BACKGROUND**

29 **A. The FOIA Request and Stipulated Search Parameters**

30 On April 11, 2013, the ACLU submitted a FOIA request to the United States Department
31 of Justice’s (“DOJ”) Criminal Division and the Executive Office for United States Attorneys

32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
5510
5511
5512
5513
5514
5515
5516
5517
5518
5519
5520
5521
5522
5523
5524
5525
5526
5527
5528
5529
5530
5531
5532
5533
5534
5535
5536
5537
5538
5539
5540
5541
5542
5543
5544
5545
5546
5547
5548
5549
5550
5551
5552
5553
5554
5555
5556
5557
5558
5559
55510
55511
55512
55513
55514
55515
55516
55517
55518
55519
55520
55521
55522
55523
55524
55525
55526
55527
55528
55529
55530
55531
55532
55533
55534
55535
55536
55537
55538
55539
55540
55541
55542
55543
55544
55545
55546
55547
55548
55549
55550
55551
55552
55553
55554
55555
55556
55557
55558
55559
555510
555511
555512
555513
555514
555515
555516
555517
555518
555519
555520
555521
555522
555523
555524
555525
555526
555527
555528
555529
555530
555531
555532
555533
555534
555535
555536
555537
555538
555539
555540
555541
555542
555543
555544
555545
555546
555547
555548
555549
555550
555551
555552
555553
555554
555555
555556
555557
555558
555559
5555510
5555511
5555512
5555513
5555514
5555515
5555516
5555517
5555518
5555519
5555520
5555521
5555522
5555523
5555524
5555525
5555526
5555527
5555528
5555529
5555530
5555531
5555532
5555533
5555534
5555535
5555536
5555537
5555538
5555539
5555540
5555541
5555542
5555543
5555544
5555545
5555546
5555547
5555548
5555549
5555550
5555551
5555552
5555553
5555554
5555555
5555556
5555557
5555558
5555559
55555510
55555511
55555512
55555513
55555514
55555515
55555516
55555517
55555518
55555519
55555520
55555521
55555522
55555523
55555524
55555525
55555526
55555527
55555528
55555529
55555530
55555531
55555532
55555533
55555534
55555535
55555536
55555537
55555538
55555539
55555540
55555541
55555542
55555543
55555544
55555545
55555546
55555547
55555548
55555549
55555550
55555551
55555552
55555553
55555554
55555555
55555556
55555557
55555558
55555559
555555510
555555511
555555512
555555513
555555514
555555515
555555516
555555517
555555518
555555519
555555520
555555521
555555522
555555523
555555524
555555525
555555526
555555527
555555528
555555529
555555530
555555531
555555532
555555533
555555534
555555535
555555536
555555537
555555538
555555539
555555540
555555541
555555542
555555543
555555544
555555545
555555546
555555547
555555548
555555549
555555550
555555551
555555552
555555553
555555554
555555555
555555556
555555557
555555558
555555559
5555555510
5555555511
5555555512
5555555513
5555555514
5555555515
5555555516
5555555517
5555555518
5555555519
5555555520
5555555521
5555555522
5555555523
5555555524
5555555525
5555555526
5555555527
5555555528
5555555529
5555555530
5555555531
5555555532
5555555533
5555555534
5555555535
5555555536
5555555537
5555555538
5555555539
5555555540
5555555541
5555555542
5555555543
5555555544
5555555545
5555555546
5555555547
5555555548
5555555549
5555555550
5555555551
5555555552
5555555553
5555555554
5555555555
5555555556
5555555557
5555555558
5555555559
55555555510
55555555511
55555555512
55555555513
55555555514
55555555515
55555555516
55555555517
55555555518
55555555519
55555555520
55555555521
55555555522
55555555523
55555555524
55555555525
55555555526
55555555527
55555555528
55555555529
55555555530
55555555531
55555555532
55555555533
55555555534
55555555535
55555555536
55555555537
55555555538
55555555539
55555555540
55555555541
55555555542
55555555543
55555555544
55555555545
55555555546
55555555547
55555555548
55555555549
55555555550
55555555551
55555555552
55555555553
55555555554
55555555555
55555555556
55555555557
55555555558
55555555559
555555555510
555555555511
555555555512
555555555513
555555555514
555555555515
555555555516
555555555517
555555555518
555555555519
555555555520
555555555521
555555555522
555555555523
555555555524
555555555525
555555555526
555555555527
555555555528
555555555529
555555555530
555555555531
555555555532
555555555533
555555555534
555555555535
555555555536
555555555537
555555555538
555555555539
555555555540
555555555541
555555555542
555555555543
555555555544
555555555545
555555555546
555555555547
555555555548
555555555549
555555555550
555555555551
555555555552
555555555553
555555555554
555555555555
555555555556
555555555557
555555555558
555555555559
5555555555510
5555555555511
5555555555512
5555555555513
5555555555514
5555555555515
5555555555516
5555555555517
5555555555518
5555555555519
5555555555520
5555555555521
5555555555522
5555555555523
5555555555524
5555555555525
5555555555526
5555555555527
5555555555528
5555555555529
5555555555530
5555555555531
5555555555532
5555555555533
5555555555534
5555555555535
5555555555536
5555555555537
5555555555538
5555555555539
5555555555540
5555555555541
5555555555542
5555555555543
5555555555544
5555555555545
5555555555546
5555555555547
5555555555548
5555555555549
5555555555550
5555555555551
5555555555552
5555555555553
5555555555554
5555555555555
5555555555556
5555555555557
5555555555558
5555555555559
55555555555510
55555555555511
55555555555512
55555555555513
55555555555514
55555555555515
55555555555516
55555555555517
55555555555518
55555555555519
55555555555520
55555555555521
55555555555522
55555555555523
55555555555524
55555555555525
55555555555526
55555555555527
55555555555528
55555555555529
55555555555530
55555555555531
55555555555532
55555555555533
55555555555534
55555555555535
55555555555536
55555555555537
55555555555538
55555555555539
55555555555540
55555555555541
55555555555542
55555555555543
55555555555544
55555555555545
55555555555546
55555555555547
55555555555548
55555555555549
55555555555550
55555555555551
55555555555552
55555555555553
55555555555554
55555555555555
55555555555556
55555555555557
55555555555558
55555555555559
555555555555510
555555555555511
555555555555512
555555555555513
555555555555514
555555555555515
555555555555516
555555555555517
555555555555518
555555555555519
555555555555520
555555555555521
555555555555522
555555555555523
555555555555524
555555555555525
555555555555526
555555555555527
555555555555528
555555555555529
555555555555530
555555555555531
555555555555532
555555555555533
555555555555534
555555555555535
555555555555536
555555555555537
555555555555538
555555555555539
555555555555540
555555555555541
555555555555542
555555555555543
555555555555544
555555555555545
555555555555546
555555555555547
555555555555548
555555555555549
555555555555550
555555555555551
555555555555552
555555555555553
555555555555554
555555555555555
555555555555556
555555555555557
555555555555558
555555555555559
5555555555555510
5555555555555511
5555555555555512
5555555555555513
5555555555555514
5555555555555515
5555555555555516
5555555555555517
5555555555555518
5555555555555519
5555555555555520
5555555555555521
5555555555555522
5555555555555523
5555555555555524
5555555555555525
5555555555555526
5555555555555527
5555555555555528
5555555555555529
5555555555555530
5555555555555531
5555555555555532
5555555555555533
5555555555555534
5555555555555535
5555555555555536
5555555555555537
5555555555555538
5555555555555539
5555555555555540
5555555555555541
5555555555555542
5555555555555543
5555555555555544
5555555555555545
5555555555555546
5555555555555547
5555555555555548
5555555555555549
5555555555555550
5555555555555551
5555555555555552
5555555555555553
5555555555555554
5555555555555555
5555555555555556
5555555555555557
5555555555555558
55555555555555

1 (“EOUSA”) for records “pertaining to the federal government’s use of mobile tracking technology
2 commonly known as a StingRay but more generically known as an International Mobile
3 Subscriber Identity or IMSI Catcher.” Compl., Ex. 2; Sprung Decl., Ex. A, Dkt. No. 35-2.
4 Specifically, the FOIA request sought the following:

- 5 1) Policies, procedures, practices, legal opinions, memoranda, briefs, correspondence (including e-mails) and training materials, template applications, template affidavits in support of applications, template proposed court orders or warrants, and any other document referencing or relating to IMSI catchers;
- 6 2) Policies, procedures, practices, legal opinions, memoranda, briefs, correspondence (including e-mails), training materials, and any other document referencing or relating to the Wireless Intercept and Tracking Team of the Federal Bureau of Investigation; and
- 7 3) All documents relating to the disclosure to the public and media coverage of [a] May 23, 2011 email attached to [plaintiff’s request].

8 *Id.* The FOIA request also sought documents identified in response to an earlier FOIA request by
9 Christopher Soghoian from August 1, 2011 (the “Soghoian Request”). *Id.* The ACLU asked for
10 expedited processing of its request pursuant to 5 U.S.C. § 522(a)(6)(E) on the grounds that this
11 matter is of “widespread and exceptional media interest” in which there exists “possible questions
12 about the government’s integrity which affect public confidence.” *Id.*

13 On July 8, 2013, the ACLU filed the present suit, alleging that the Government had not yet
14 provided a substantive response. Compl. ¶ 3. In a letter dated July 10, 2013, the DOJ granted the
15 ACLU’s request for expedited processing. Lye Decl. ¶ 2 & Ex. 18, Dkt. No. 37-15. The parties
16 later enter into a stipulation regarding the scope and processing of the ACLU’s request, with some
17 documents to be processed by the EOUSA and others to be process by the Criminal Division. *See*
18 Dkt. No. 14. Among other things, the stipulation did the following:

- 19 • limited the search period to between January 1, 2008 and August 30, 2013;
- 20 • limited the search for Parts 1-2 to “final policies, procedures and practices referencing
21 or relating to either IMSI catchers or the Wireless Intercept and Tracking Team of the
22 Federal Bureau of Investigation [FBI]” using agreed-upon search terms;
- 23 • limited the search for Part 3 to “documents relating or referring to the disclosure to the

public and media coverage pertaining to the May 23, 2011 email[;]"

- provided that the Criminal Division would have its Computer Crime and Intellectual Property Section (“CCIPS”) and Electronic Surveillance Unit (“ESU”) search for responsive documents within its possession, custody, or control;
- provided that EOUSA’s FOIA unit would work with the Criminal Chiefs for the United States Attorney’s Offices for ten specified federal districts, as well as the directors and deputy directors of certain other specified EOUSA component offices, to identify responsive documents within their possession, custody, or control; and
- provided that the Government would process all documents identified in response to the Soghoian Request.

Id. at 2-4. Both the Criminal Division and EOUSA have confirmed that they searched for records in compliance with the stipulation, and the ACLU has not contended otherwise. *See* Sprung Decl. ¶¶ 11-20; Kornmeier Decl. ¶ 5.

B. The Government's Response

In December 2013, EOUSA disclosed one page and informed the ACLU that it was withholding 138 pages in full pursuant to FOIA Exemptions 5, 7(C), and 7(E). Kornmeier Decl. ¶ 5 and Exs. A & B. The Criminal Division disclosed seven pages in part and informed the ACLU it was withholding 209 pages in full pursuant to FOIA Exemptions 5, 6, 7(A), 7(C), 7(E), and 7(F). Sprung Decl. ¶ 24 and Ex. F.

In the course of briefing their motions for summary judgment, the parties exchanged additional information and some additional documents, narrowing the focus of their dispute as to the Criminal Division documents. *See generally* Suppl. Sprung Decl. & Suppl. Lye Decl. On February 3, 2015, the Court requested that the parties submit a joint statement clarifying the scope of the ACLU's remaining challenges. Dkt. No. 43. The Order also gave the Government an opportunity to submit additional declarations or evidence supporting asserted exemptions. *Id.* The ACLU was likewise given the opportunity to submit additional declarations as needed. *Id.*

The parties responded with a joint statement on March 3, 2015. Dkt. No. 46. The Government submitted an additional declaration in support of the Criminal Division documents.

1 but stated that “with respect to the EOUSA templates, defendant rests on the *Vaughn* descriptions
2 for these documents and the Declaration of John Kornmeier submitted with defendant’s opening
3 motion for summary judgment (ECF No. 35-1).” Jt. Stmt. at 23.

4 As it stands, in the dispute with the EOUSA, the ACLU seeks two different set of legal
5 templates described more fully below. *Id.* at 21-23. In the dispute with the Criminal Division, the
6 issue is whether it should produce: (1) templates or “go-bys” relating to applications and proposed
7 orders for authorization to use CSS and related technology; (2) legal guidance memoranda,
8 including an email with an attached description of how CSS is utilized by law enforcement; (3) an
9 excerpt from the USA Book, a DOJ agency manual; and (4) a sealed search warrant and
10 supporting application and affidavit. *See id.* at 1-21.

11 C. Hearing and *In Camera* Review

12 On April 2, 2015, the Court held a hearing on this matter. Dkt. No. 50. Much of the
13 parties’ arguments involved comparing this case to a prior order in the related case, *Am. Civil*
14 *Liberties Union of N. Cal. v. Dep’t of Justice* (“*ACLU I*”), ___F. Supp. 2d ___, 2014 WL 4954277,
15 at *9 (N.D. Cal. Sept. 30, 2014), which involved the same parties and a similar subject matter.
16 The Government has appealed that Order. *See ACLU I*, No. 12-CV-04008-MEJ (N.D. Cal.), Dkt.
17 No. 66. At the hearing, the Court asked the parties whether they would consider staying this case
18 pending the outcome of the related action. *See* Dkt. No. 50. The parties both agreed that they
19 preferred a ruling on this case before the Court of Appeals decides *ACLU I*. *See id.*

20 The parties agreed, however, to allow the Government to submit the EOUSA documents as
21 well as a sampling of the Criminal Division documents for the Court’s *in camera* review. *Id.*
22 Consequently, the Court ordered Documents 3 and 4 from the Kornmeier Declaration to be lodged
23 with the Court, as well as the following documents from the Third Sprung Declaration: CRM-Lye-
24 39451-39484 (only the portion containing the sealing order); CRM-Lye-2541 (USA Book); and
25 internal memorandum at CRM-Lye-2948, CRM-Lye-3818-3825, CRM-Lye-9853-9897, CRM-
26 Lye-15311-15316, CRM-Lye-28119-28126, CRM-Lye-34065-34066, and CRM-Lye-17543-
27 17544. Dkt. No. 49. Additionally, the Court asked the Government to submit a list of documents
28 that it proposed the Court should view as a representative sample of the Criminal Division

1 templates. *Id.* The Court gave the ACLU the opportunity to respond if it believed that other or
2 additional documents should be submitted. *Id.*

3 The Government submitted its proposed list on April 17, 2015. Dkt. No. 51. The ACLU
4 did not file a response. Accordingly, the Court ordered that the Government lodge with the Court
5 the documents it proposed on its list. Dkt. No. 52. This sample of documents includes the
6 following: CRM-Lye-9002-9010; CRM-Lye-9011-9019; CRM-Lye-00015173-00015181; CRM-
7 Lye-00015200-00015207; CRM-Lye-00031754-00031777; and CRM-Lye-00038268-00038270.
8 *Id.* According to the Government, these documents are substantially similar to other withheld
9 documents. *See* Dkt. No. 51 at 1-2 n.1-5. The Government has timely lodged all documents for
10 the Court's *in camera* review. Now, having had the opportunity to conduct an *in camera* review
11 of the above-referenced documents, the Court issues the following Order.

12 **LEGAL STANDARD**

13 **A. The FOIA Statutory Scheme**

14 FOIA's "core purpose" is to inform citizens about "what their government is up to." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989)). This purpose is
15 accomplished by "permit[ting] access to official information long shielded unnecessarily from
16 public view and attempt[ing] to create a judicially enforceable public right to secure such
17 information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). Such
18 access "ensure[s] an informed citizenry, vital to the functioning of a democratic society, needed to
19 check against corruption and to hold the governors accountable to the governed." *John Doe
20 Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). Congress enacted FOIA
21 to "clos[e] the loopholes which allow agencies to deny legitimate information to the public." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (citations and internal marks omitted).

22 At the same time, FOIA contemplates that some information can legitimately be kept from
23 the public through the invocation of nine "Exemptions" to disclosure. *See* 5 U.S.C. § 552(b)(1)-
24 (9). "These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the
25 dominant objective of the Act." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532

1 U.S. 1, 7-8 (2001) (citation omitted). “Consistently with this purpose, as well as the plain
2 language of the Act, the strong presumption in favor of disclosure places the burden on the agency
3 to justify the withholding of any requested documents.” *United States Dep’t of State v. Ray*, 502
4 U.S. 164, 173 (1991).

5 **B. Summary Judgment Standard in FOIA Cases**

6 “Summary judgment is the procedural vehicle by which nearly all FOIA cases are
7 resolved.” *Nat’l Res. Def. Council v. U.S. Dep’t of Def.*, 388 F. Supp. 2d 1086, 1094 (C.D. Cal.
8 2005) (quoting *Mace v. EEOC*, 37 F. Supp. 2d 1144, 1145 (E.D. Mo. 1999), *aff’d sub nom. Mace*
9 *v. EEOC*, 197 F.3d 329 (8th Cir. 1999)). The underlying facts and possible inferences are
10 construed in favor of the FOIA requester. *Id.* at 1095 (citing *Weisberg v. U.S. Dep’t of Justice*,
11 705 F.2d 1344, 1350 (D.C. Cir. 1983)). Because the facts are rarely in dispute in a FOIA case, the
12 Court need not ask whether there is a genuine issue of material fact. *Minier v. CIA*, 88 F.3d 796,
13 800 (9th Cir. 1996).

14 The standard for summary judgment in a FOIA case generally requires a two-stage inquiry.
15 *See Animal Legal Def. Fund v. FDA*, 2013 WL 4511936, at *3 (N.D. Cal. Aug. 23, 2013). Under
16 the first step of the inquiry, the Court must determine whether the agency has met its burden of
17 proving that it fully discharged its obligations under FOIA. *Zemansky v. EPA*, 767 F.2d 569, 571
18 (9th Cir. 1985) (citing *Weisberg*, 705 F.2d at 1350-51). In the second stage of the inquiry, the
19 Court examines whether the agency has proven that the information that it withheld falls within
20 one of the nine FOIA exemptions. 5 U.S.C. § 552(a)(4)(B); *Ray*, 502 U.S. at 173 (“The burden
21 remains with the agency when it seeks to justify the redaction of identifying information in a
22 particular document as well as when it seeks to withhold an entire document.”); *Dobronski v.*
23 *FCC*, 17 F.3d 275, 277 (9th Cir. 1994). When an agency chooses to invoke an exemption to
24 shield information from disclosure, it bears the burden of proving the applicability of the
25 exemption. *See Reporters Comm.*, 489 U.S. at 755. An agency may withhold only that
26 information to which the exemption applies, and must provide all “reasonably segregable”
27 portions of that record to the requester. 5 U.S.C. § 552(b)(9); *see Mead Data Cent., Inc. v. Dep’t*
28 *of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

1 To carry their burden on summary judgment, “agencies are typically required to submit an
2 index and ‘detailed public affidavits’ that, together, ‘identify[] the documents withheld, the FOIA
3 exemptions claimed, and a particularized explanation of why each document falls within the
4 claimed exemption.’” *Yonemoto*, 686 F.3d at 688 (quoting *Lion Raisins v. Dep’t of Agric.*, 354
5 F.3d 1072, 1082 (9th Cir. 2004)) (modification in original). These submissions—commonly
6 referred to as a *Vaughn* Index—must be from “affiants [who] are knowledgeable about the
7 information sought” and “detailed enough to allow [a] court to make an independent assessment of
8 the government’s claim [of exemption].” *Id.* (citing *Lion Raisins*, 354 F.3d at 1079; 5 U.S.C. §
9 552(a)(4)(B)). The government may also submit affidavits to satisfy its burden, but “the
10 government ‘may not rely upon conclusory and generalized allegations of exemptions.’” *Kamman*
11 *v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (quoting *Church of Scientology v. Dep’t of the Army*, 611
12 F.2d 738, 742 (9th Cir. 1980)). The government’s “affidavits must contain ‘reasonably detailed
13 descriptions of the documents and allege facts sufficient to establish an exemption.’” *Id.* (quoting
14 *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987)). Courts “accord substantial weight to an
15 agency’s declarations regarding the application of a FOIA exemption.” *Shannahan v. IRS*, 672
16 F.3d 1142, 1148 (9th Cir. 2012) (citing *Hunt v. CIA*, 981 F.2d 1116, 1119-20 (9th Cir. 1992)).

17 Finally, FOIA requires that “[a]ny reasonably segregable portion of a record shall be
18 provided to any person requesting such record after deletion of the portions which are exempt
19 under this subsection.” 5 U.S.C. § 552(b).

20 DISCUSSION

21 Because the parties have previously agreed upon the scope and methods of the DOJ’s
22 search for responsive documents, the only issue for the Court to decide on summary judgment is
23 whether the Government properly withheld records under the FOIA exemptions. The Government
24 contends that it is authorized to withhold documents under the following exemptions:

25 • Exemption 5 (attorney work product privilege, attorney-client privilege, and
26 deliberative process privilege)

27 • Exemption 6 (private personnel and medical files)

28 • Exemption 7 (law enforcement records or information)

1 In addition to these exemptions, the Government argues that (1) it may not disclose records courts
2 have sealed in other cases, and (2) it has already produced all reasonably segregable portions of
3 responsive records. The Court considers each of the documents at issue below.

4 **A. Templates**

5 Both the EOUSA and the Criminal Division withheld templates: the EOUSA withheld
6 templates under FOIA Exemption 5, and the Criminal Division withheld templates pursuant to
7 both FOIA Exemptions 5 and 7(e).

8 1. EOUSA Templates

9 FOIA Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums
10 or letters which would not be available by law to a party other than an agency in litigation with the
11 agency.” 5 U.S.C. § 552(b)(5). This provision essentially grants an agency the same power to
12 withhold documents as it would have in the civil discovery context. *See NLRB v. Sears, Roebuck*
13 & Co., 421 U.S. 132, 149 (1975).

14 The EOUSA withheld the following documents on attorney work-product grounds: (1) a
15 set of templates from the U.S. Attorney’s Office (“USAO”) for the Central District of California,
16 consisting of (a) an Application for Use of an Electronic Serial Number Identifier, with a
17 suggested memorandum of points and authorities and a proposed order, and (b) an Ex Parte
18 Application for a Warrant Authorizing the Disclosure of GPS and Cell Site Information and Use
19 of Mobile Electronic Device, with a request to seal the agent’s declaration and the warrant
20 (Kornmeier Decl., Ex. B at 2-3 (“Doc. #3”)); and (2) a set of templates from the USAO for the
21 Eastern District of Wisconsin consisting of an Application for a Warrant Authorizing the
22 Disclosure of Data Relating to a Specified Cellular Telephone, with a warrant authorizing the
23 disclosure (*Id.* at 3-4 (“Doc. #4”)).² The DOJ contends that these documents reflect the opinions
24 and thought processes of attorneys “in the clear anticipation of serial litigation” and fall squarely
25

26

² The EOUSA also withheld a one-page email from an FBI Assistant General Counsel to an
27 Assistant United States Attorney (“AUSA”) in the District of Arizona regarding a criminal case,
28 which discusses the best way to describe the use of a particular tracking technique in response to a
question from the criminal defendant (Kornmeier Decl., Ex. B at 1-2 (Doc. #2)). The ACLU does
not seek disclosure of this document. Pl. Mot. at 25.

1 within the definition of work product. Gov. Mot. at 8-9; Kornmeier Decl. ¶¶ 7-8; Ex. B at 2-4.

2 Attorney work-product protects “against disclosure of the mental impressions, conclusions,
3 opinions, or legal theories of a party’s attorney or other representative concerning the litigation” as
4 well as “documents prepared in anticipation of litigation.” Fed. R. Civ. P. 26(b)(3). The purpose
5 of this protection is to “protect[] the attorney’s thought processes and legal recommendations from
6 the prying eyes of his or her opponent.” *In re EchoStar Commc’ns Corp.*, 448 F.3d 1294, 1301
7 (Fed. Cir. 2006) (quotation and internal marks omitted), *cert. denied sub nom. TiVo, Inc. v.*
8 *EchoStar Commc’ns Corp.*, 549 U.S. 1096 (2006); *see also Hickman v. Taylor*, 329 U.S. 495, 508
9 (1947). Importantly, “[i]f a document is fully protected as work product, then segregability is not
10 required.” *Judicial Watch, Inc. v. Dep’t of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005) (“factual
11 material is itself privileged when it appears within documents that are attorney work product”); *see*
12 *also Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997) (“[a]ny part of [a document]
13 prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and
14 the like, is protected by the work product doctrine and falls under exemption 5.”). “In light of the
15 strong policy of the FOIA that the public is entitled to know what its government is doing and
16 why, [E]xemption 5 is to be applied as narrowly as consistent with efficient Government
17 operation.” *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 979 (9th Cir. 2009) (quoting
18 *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997)), *cert. denied*,
19 561 U.S. 1007 (2010).

20 The parties dispute whether EOUSA’s withheld documents were “prepared in anticipation
21 of litigation.” The ACLU contends that the templates and proposed orders are not attorney work
22 product because they do not pertain to any particular matter or specific case. Pl. Mot. at 12-13, 25.
23 It argues that the Government offers no legal or factual basis to distinguish this case from *ACLU I*.
24 In *ACLU I*, this Court considered whether template applications for court authorization to conduct
25 electronic surveillance were protected as work product. 2014 WL 4954277, at *7-10. The *ACLU*
26 *I* templates were an “application and order for the use of a pen register and trap and trace device.”
27 *Id.* at *7. On review of the Government’s supporting declarations and *Vaughn* Index, the Court
28 concluded that the Government had not shown that these templates were protected as work

1 product because there was no indication that they “provide legal theories or strategies for use in
2 criminal litigation.” *Id.* at *9. “Rather, they instruct government attorneys on how to apply for an
3 order for location tracking information.” *Id.*; *see also Judicial Watch, Inc. v. U.S. Dep’t of*
4 *Homeland Sec.*, 926 F. Supp. 2d 121, 143 (D.D.C. 2013) (“While the memorandum may be, in a
5 literal sense, ‘in anticipation of litigation’—it simply does not anticipate litigation in the way the
6 work-product doctrine demands, as there is no indication that the document includes the mental
7 impressions, conclusions, opinions, or legal theories of . . . any [] agency attorney, relevant to any
8 specific, ongoing or prospective case or cases.”).

9 While the foregoing was the Court’s primary basis for its opinion, it also found that the
10 DOJ had “failed to establish that the template pertains to a specific claim or consists of more than
11 general instructions to its attorneys with regard to applying for location tracking orders.” *ACLU I*,
12 2014 WL 4954277, at *10. Where government lawyers act “as legal advisors protecting their
13 agency clients from the possibility of future litigation,” the work product privilege may apply to
14 documents advising the agency as to potential legal challenges. *Id.* at *9 (quoting *In re Sealed*
15 *Case*, 146 F.3d 881, 885 (D.C. Cir. 1998)). But when government lawyers are acting as
16 “prosecutors or investigators of suspected wrongdoers,” the specific-claim test applies. *Id.* (citing
17 *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 864-66 (D.C. Cir. 1980) and *SafeCard*
18 *Servs. Inc. v. SEC*, 926 F.2d 1197, 1202-03 (D.C. Cir. 1991)). As a result, the work product
19 privilege only attaches to documents prepared “in the course of an active investigation focusing
20 upon specific events and a specific possible violation by a specific party.” *Id.* at *10 (quoting
21 *Safecard*, 926 F.2d at 1203 and citing *Judicial Watch*, 926 F. Supp. 2d at 139-42). The Court
22 found that U.S. Attorneys act as prosecutors in utilizing these applications and orders, and not as
23 attorneys advising an agency client on the agency’s potential liability. *Id.* Consequently, the
24 Court ultimately found that the documents the DOJ sought to withhold were not work product as
25 they “set forth general legal standards, not an analysis of issues arising in ‘identified litigation’ or
26 strategic decisions regarding any particular investigation.” *Id.* at *10 n.5. The ACLU now urges
27 the Court to adopt a similar holding here.

28 But the Court did not limit its holding to the degree the ACLU seeks. Specifically, the

1 ACLU argues that the Court’s earlier holding in *ACLU I* drew a distinction between “offensive
2 and defensive postures” in determining whether the specific claim test applies. *See* Pl. Reply at 4,
3 Dkt. No. 41. To the extent the ACLU reads the Court’s holding this broadly, that was not the
4 Court’s intent. Importantly, in *ACLU I*, in addition to considering the “templates,” the Court also
5 considered whether certain internal memoranda were covered as attorney work product. The
6 internal memoranda, like the templates here, were “prepared because of ongoing litigation and the
7 prospect of future litigation” and were “intended to outline possible arguments and or litigation
8 risks prosecutors could encounter” and to “assess the strengths and weaknesses of alternative
9 litigating positions.” 2014 WL 4954277, at *11. Consequently, the Court found that the
10 memoranda were protected as work product because they were “created to assist AUSAs with
11 recurring litigation issues . . . that have arisen in current litigation.” *Id.* The Court concluded that
12 “[w]here, as here, the purpose of the documents is to convey litigation strategy, rather than convey
13 routine agency policy, they are entitled to work product protection.” *Id.* (citing *Am. Immigration
14 Council v. U.S. Dep’t of Homeland Sec.*, 905 F. Supp. 2d 206, 221 (D.D.C. 2012)). As indicated,
15 the primary concern in determining whether a document is protected as work product was and
16 continues to be whether it was created in anticipation litigation in the way the work-product
17 doctrine demands, i.e., by risking revealing mental impressions, conclusions, opinions, or legal
18 theories of an agency attorney, relevant to any specific, ongoing, or prospective case or cases.

19 The Ninth Circuit has stated that “[t]o qualify for work-product protection, documents
20 must: (1) be ‘prepared in anticipation of litigation or for trial’ and (2) be prepared ‘by or for
21 another party or by or for that other party’s representative.’ *United States v. Richey*, 632 F.3d 559,
22 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Env’tl. Mgmt.* (“*Torf*”),
23 357 F.3d 900, 907 (2004)). *Torf* further elaborates that:

24 [t]he “because of” standard does not consider whether litigation was
25 a primary or secondary motive behind the creation of a document.
26 Rather, it considers the totality of the circumstances and affords
27 protection when it can fairly be said that the “document was created
because of anticipated litigation, and *would not have been created in
substantially similar form but for the prospect of that litigation* [.]”
28 *Id.* at 908 (quotation omitted; emphasis added). In concluding that the privilege applied on *Torf*’s

1 facts, the Ninth Circuit stated that “[t]he documents are entitled to work product protection
 2 because, taking into account the facts surrounding their creation, their litigation purpose *so*
 3 *permeates any non-litigation purpose that the two purposes cannot be discretely separated* from
 4 the factual nexus as a whole.” *Id.* at 910 (emphasis added); *see also City & Cnty. of Honolulu v.*
 5 *U.S. EPA*, 2009 WL 855896, at *9 (D. Haw. Mar. 27, 2009) (“Under Ninth Circuit law, the test is
 6 whether the attorney would have generated the material ‘but for’ the prospect of litigation, though
 7 it is immaterial whether or when the litigation actually begins.”); *Elkins v. D.C.*, 250 F.R.D. 20, 26
 8 (D.D.C. 2008) (“Plaintiffs argue that some documents were not prepared in anticipation of *this*
 9 litigation, *i.e.* they were prepared in anticipation of obtaining the search warrant and thus in
 10 anticipation of the administrative proceeding. But the doctrine protects documents prepared in
 11 anticipation of litigation; it does not have to be for this district court proceeding.” (citations
 12 omitted; emphasis in original)).

13 This case presents a novel question in the work product realm as the Government’s
 14 applications and proposed orders seek authorization to obtain and collect information that will be
 15 used in investigations of suspected criminals and that may ultimately lead to the prosecution of
 16 those individuals. According to the Government’s supporting declaration, these templates were
 17 prepared in anticipation of “serial litigation.” Kornmeier Decl., Ex. B at 2-4. They contain
 18 “specific research” by Government attorneys and those attorneys’ “opinions and thought
 19 processes.” *Id.* Specifically, the EOUSA’s *Vaughn* Index entries for the withheld documents state
 20 in relevant part:

21 Government attorneys, based on their research and analysis, have
 22 prepared this document as legal advice, in the clear anticipation of
 23 serial litigation. They contain specific research that the attorneys for
 24 the USAO think are pertinent to criminal litigation involving
 tracking devices. [They contain instructions for alternative
 situations.]³ These are the opinions and thought processes of
 attorneys in anticipation of litigation[.]

25 Kornmeier Decl., Ex. B at 2-4.⁴ The Government explains that “the templates were intended to

26
 27 ³ This sentence was only included for Doc. #3, not Doc. #4.

28 ⁴ Compare *ACLU I*, 2014 WL 4954277, at *7, where *Vaughn* Index stated:

1 assist prosecutors in anticipating and addressing potential legal risks and pitfalls in applying for
2 the CSS.” Gov. Reply at 6, Dkt. No. 40.

3 The actual purpose of the documents is to obtain the sought-after information, but the
4 ultimate goal of that information is to use it towards the prosecution of alleged criminals. In that
5 prosecution, a criminal defendant may challenge the Government’s evidence through a motion to
6 suppress, which in turn may implicate a number of the same factual and legal issues addressed in
7 these withheld documents. In this sense, the Court cannot divorce the non-litigation purpose—i.e.,
8 simply procuring court authorization to obtain the suspected evidence—from the litigation
9 purpose—i.e., forming the support for the criminal case and developing arguments to protect
10 against attempts to prevent the acquired evidence’s use. *See Gen. Elec. Co. v. Johnson*, 2006 WL
11 2616187, at *11 (D.D.C. Sep. 12, 2006) (“a work-product assertion must be supported by some
12 articulable, specific fact or circumstance that illustrates the reasonableness of a belief that
13 litigation was foreseeable.”). Put another way, there are two stages at which the Government must
14 support that the evidence acquired can be used in criminal litigation: first, in applying for the
15 authorization to obtain the evidence, and second, in defending a potential motion to suppress. In
16 reviewing the *in camera* documents, the Government’s legal analysis is geared toward the first
17 stage but that same analysis could readily be applied later in the criminal litigation including on a
18 motion to suppress. The litigation purpose and concerns in the later adversarial setting permeate
19 the document’s non-litigation purpose. Accordingly, the Court finds these documents protected as
20 work product. *See also Elkins*, 250 F.R.D. at 26 (finding documents prepared in anticipation of
21 obtaining a search warrant protected as work product).

22 Additionally, if a document is covered by the attorney work-product privilege, the
23

24 These 16 pages were created by the U.S. Attorney’s Office for the
25 Northern District of California. The 16 pages are templates for an
26 application and order for the use of a pen register and trap and trace
27 device. The templates incorporate the interpretation of the law by
28 the U.S. Attorney’s Office and give advice on what information to
include in particular situations. These templates represent the
opinions of attorneys for the U.S. Attorney’s Office on the
applicable law and are prepared to provide legal advice and in
anticipation of litigation[.]

1 Government need not segregate and disclose its factual contents. *See* 5 U.S.C. § 552(b); *Maricopa*
2 *Audubon Soc'y*, 108 F.3d at 1092; *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th
3 Cir. 2008). Having reviewed the *in camera* documents, and finding the legal analysis within
4 closely tied to the facts of how this technology is used, the Court finds that the documents were
5 created in whole in anticipation of litigation.

6 2. Criminal Division Templates

7 The Criminal Division also withheld templates under Exemption 5 as protected by the
8 attorney work product privilege,⁵ as well as Exemption 7(E). These templates include
9 applications, agent affidavits, memorandums of law, and proposed orders for the use of a CSS and
10 other investigative techniques. Second Sprung Decl. ¶ 27; Third Sprung Decl. ¶ 8.

11 The Government maintains that the templates withheld by the Criminal Division were
12 prepared “in anticipation of specific litigation—to wit, a criminal prosecution in which evidence
13 derived from a CSS was to be instrumental.” Gov. Mot. at 18-19. It argues that the withheld
14 materials are “litigation strategy documents that were provided by DOJ attorneys—frequently
15 Criminal Division subject matter experts, addressing questions from prosecutors arising from
16 specific cases—to advise prosecutors on the types of legal risks and challenges confronting them
17 in applying for permission to use CSS.” Gov. Reply at 8. “These documents anticipate a
18 foreseeable prosecution of the individuals implicated in the investigation of the criminal activity in
19 which the template will be used and are disseminated for the purpose of assisting prosecutors to
20 defend subsequent motions to suppress filed by criminal defendants.” Third Sprung Decl. ¶ 8;
21 Sec. Sprung Decl. ¶ 27; *see also* First Sprung Decl. ¶ 42(h). “They are drafted or collected by
22 Criminal Division legal advisors who are subject matter experts for the use of federal prosecutors
23 who are working on active investigations.” *Id.* (all). “The templates do not instruct government
24 attorneys on how they must apply for location tracking information, although they do contain
25 Criminal Division attorneys’ interpretation of recent case law and reflect the strategies that

26
27

⁵ The Government previously asserted that these templates were protected by the deliberative
28 process privilege, but the Government has withdrawn its claim to this privilege as to these
documents. *See* Third Sprung Decl. at 4 n.1; *see also* Jt. Stmt. at 1-14.

1 prosecutors may use to obtain court authorization.” *Id.* (all).

2 These descriptions parallel the Court’s analysis above. Specifically, the Government uses
3 these template applications, affidavits, memorandums of law, and proposed orders to secure court
4 permission to utilize CSS and related technology, which results in the foreseeable prosecution of
5 the individuals implicated in the investigation of the criminal activity. The templates also provide
6 advice on the types of “legal risks” and challenges in applying for permission to use CSS and may
7 later help prosecutors in defending subsequent motions to suppress. *See Schiller v. NLRB*, 964
8 F.2d 1205, 1208 (D.C. Cir. 1992)) (protecting an internal NLRB memorandum that “contain[ed]
9 advice on how to build an [Equal Access to Justice Act] defense and how to litigate EAJA cases,”
10 as well as other documents that outlined instructions for preparing and filing pleadings, contained
11 legal arguments, and identified supporting authorities), *abrogated on other ground by Milner v.*
12 *Dep’t of the Navy*, 562 U.S. 562 (2011). As with *ACLU I*’s legal memoranda, these documents
13 reflect strategies, opinions, and advice that arise from “specific cases” and are used by attorneys
14 working on “active investigations” and “foreseeable prosecution[s].” Third Sprung Decl. ¶ 8. In
15 accordance with the Court’s analysis above, and having reviewed these documents *in camera*, the
16 Court finds the Criminal Division templates protected as work product under Exemption 5.

17 **B. Memorandums**

18 The Government also withheld a variety of legal memoranda and an email under various
19 Exemptions described in turn below. *See* Third Sprung Decl. ¶¶ 9-15; Suppl. Lye Decl. ¶¶ 12-13.

20 1. Documents Withheld Under Exemptions 5 and 7(E)

21 First, several of the documents described as internal memorandum are substantially similar
22 to the so-called “template” or “go-by” documents the Court found protected as attorney work
23 product. According to that same analysis, and having conducted an *in camera* review of the
24 following documents, the Court finds them protected as work product:

25 • **CRM-Lye-2948**, which contains “model language for federal prosecutors to include in a
26 proposed order authorizing the use of a CSS by DEA and other law enforcement personnel
27 under the PR/TT statute.” Third Sprung Decl. ¶ 9.

28 • **CRM-Lye-9853-9897**, which contains “advice of CCIPS legal advisors for prosecutors to

1 follow when seeking court-authorization to use Title III and PR/TT orders authorizing the
2 use of location tracking information in various scenarios arising in criminal
3 investigations.” *Id.* ¶ 11. “The document describes how the Government may obtain
4 location tracking information, what types of information is available from wireless
5 providers, when emergency authorization is available, what kind of legal process is
6 required under various circumstances, notification requirements, and extraterritorial
7 jurisdiction issues.” *Id.* The document also includes with it “template applications and
8 proposed orders for using each of the various technologies, and contains links for consent
9 forms, model pleadings and briefs, selected court opinions, and training materials.” *Id.*
10 “Access to these materials is restricted to prosecutors and Criminal Division attorneys via
11 the CCIPS intranet site.” *Id.*

- 12 • **CRM-Lye-34065-34066** “contains advice of legal advisors in the Criminal Division for
13 prosecutors to follow when handling kidnapping cases, including how to seek emergency
14 authorization to engage in electronic surveillance and to use location tracking technologies
15 when time is of the essence.” *Id.* ¶ 14.
- 16 • **CRM-Lye-15311-15316 and CRM-Lye-19179-19184** are “copies of template
17 applications and proposed orders for federal prosecutors to use when seeking court-
18 authorization to use a CSS under the PR-TT statute. They also include cover
19 memorandum from the Associate Director of the Criminal Division’s Office of
20 Enforcement Operations that describes the technology and provides legal guidance
21 concerning what kinds of information may lawfully be obtained.” *Id.* ¶ 12. The
22 Government withheld these documents under Exemption 5 as attorney work product. *Id.*⁶

23 A review of these documents reveals that they were prepared in contemplation of issues arising in
24 future litigation, and as such, the Court finds that a litigation purpose permeates these documents.
25 Accordingly, Exemption 5 applies and these documents are properly withheld.

26
27 ⁶ Additionally, the Government withheld the documents under Exemptions 6 and 7(C) for
28 “reveal[ing] the name and other personal information of the Associate Director for the Criminal
Division’s OEO.” Third Sprung Decl. ¶ 12.

1 However, second, the Government has not demonstrated that the following documents are
2 protected as attorney work product:

3 • **CRM-Lye-3818-3825, CRM-Lye-23249-23256, CRM-Lye-33358-33365** are “copies of a
4 document containing advice of legal advisors in the Criminal Division for AUSAs to
5 follow when seeking court-authorization to utilize different location tracking technologies
6 for wireless devices in various scenarios in particular criminal investigations.” *Id.* ¶ 10.
7 The document “discusses legal requirements, procedures to be followed, when an
8 individual’s consent may be used in lieu of a court order, and a description of the
9 underlying technologies.” *Id.*
10 • **CRM-Lye-28119-28126** is “a collection and analysis of technical terminology, legal
11 authorities, and internal DOJ procedures prepared for the purpose of assisting federal
12 prosecutors and law enforcement agents concerning various types of electronic
13 surveillance used in criminal investigations, including location tracking technologies for
14 wireless devices.” *Id.* ¶ 13.

15 According to the Government, all the documents described above “were prepared because the
16 Department of Justice was conducting a criminal prosecution or anticipating doing so” and were
17 created “to assist the Department in prosecutions and investigations.” *Id.* ¶ 16.

18 But the Government has not shown how these documents were prepared in anticipation of
19 litigation in the way the work product doctrine contemplates. Rather the documents provide
20 instructions to government attorneys about how they might seek to use the technology in various
21 circumstances. In other words, they instruct government attorneys on how they must apply for
22 location tracking information. *Compare ACLU I*, 2014 WL 4954277, at *9 (finding no attorney
23 work product where the Government’s *Vaughn* Index and related affidavits established only that
24 the documents “instruct[ed] government attorneys on how to apply for an order for location
25 tracking information.”). Nothing about these documents or their supporting declarations
26 demonstrates that a litigation purpose permeates these documents. Rather, the first set of
27 documents provides instructions about how to obtain authorization for use of the technology,
28 functioning more like an agency manual rather than revealing mental impressions. And the

1 second set of documents contains a list of terms, regurgitating statutory definitions and, in some
2 cases, dictionary definitions, with no indication that the disclosure of such a document would
3 reveal mental impressions that would be detrimental or prejudicial in the adversarial process.
4 Accordingly, the Court cannot find these documents protected as work product.

5 The question then is whether they are protected by Exemption 7(E). FOIA Exemption 7
6 permits the government to withhold “records or information compiled for law enforcement
7 purposes” under certain enumerated conditions. 5 U.S.C. § 552(b)(7). Particularly, Exemption
8 7(E) provides that “records or information compiled for law enforcement purposes” may be
9 withheld if they “would disclose techniques and procedures for law enforcement investigations or
10 prosecutions.” *Id.* However, “Exemption 7(E) only exempts investigative techniques not
11 generally known to the public.” *Rosenfeld v. Dep’t of Justice*, 57 F.3d 803, 815 (9th Cir. 1995).
12 The Government may also withhold detailed information regarding a publicly known technique
13 where the public disclosure did not provide “a technical analysis of the techniques and procedures
14 used to conduct law enforcement investigations.” *See Bowen v. U.S. Food & Drug Admin.*, 925
15 F.2d 1225, 1228-29 (9th Cir 1991); *see also Elec. Frontier Found. v. Dep’t of Defense*, 2012 WL
16 4364532, at *4 (N.D. Cal., Sep. 24, 2012). “[T]he government must show, by evidence admissible
17 on summary judgment, that release of the withheld information ‘would reasonably be expected to
18 risk circumvention of the law.’” *Id.* at *3 (quoting 5 U.S.C. § 552(b)(7)(E)).

19 The threshold test under Exemption 7 is whether the documents have a law enforcement
20 purpose, which requires an examination of whether the agency serves a “law enforcement
21 function.” *Church of Scientology Int’l v. IRS*, 995 F.2d 916, 919 (9th Cir. 1993) (internal citation
22 and quotation marks omitted). In order to satisfy Exemption 7’s threshold requirement, a
23 government agency with a clear law enforcement mandate “need only establish a rational nexus
24 between enforcement of a federal law and the document for which [a law enforcement] exemption
25 is claimed.” *Rosenfeld*, 57 F.3d at 808 (internal citation omitted). There is no dispute here that
26 the DOJ has a clear law enforcement mandate and the two documents as to which the Criminal
27 Division asserts law enforcement exemptions bear a rational nexus to enforcement of federal law.

28 The Government, however, provides little explanation as to how the disclosure of any of

1 the documents above “could reasonably be expected to risk circumvention of the law.” 5 U.S.C. §
2 552(b)(7)(E). The Government presents two primary arguments as to why Exemption 7(E)
3 applies to the materials it has withheld. First, it argues in a footnote that Exemption 7(E) is best
4 interpreted as providing categorical protection to materials describing “techniques and procedures”
5 while its inquiry into whether “disclosure could reasonably be expected to risk circumvention”
6 applies only to “guidelines.” Gov. Reply at 7 n.4; *see also* 5 U.S.C. § 552(b)(7)(E). As the
7 withheld materials relate to techniques and procedures, presumably—by the Government’s
8 logic—these materials would be categorically protected and properly withheld. In support, the
9 DOJ cites *Asian Law Caucus v. U.S. Dep’t of Homeland Sec.*, 2008 WL 5047839, at *3 (N.D. Cal.
10 Nov. 24, 2008), which found that the Ninth Circuit had yet to “squarely address” the distinction
11 between guidelines and techniques and procedures, but ultimately did not rule on whether
12 categorical protection existed as to techniques and procedures. With respect to that court’s
13 finding, the Court agrees with the ACLU that the Ninth Circuit’s holding in *Rosenfeld* “adopted []
14 as the law of this Circuit,” that “Exemption 7(E) only exempts investigative techniques not
15 generally known to the public.” *Rosenfeld*, 57 F.3d at 815. This holding establishes that
16 techniques and procedures are not categorically withheld under Exemption 7(E). *See id.* & n.9.
17 The Court sees no cause to distinguish the Ninth Circuit’s holding here.

18 Second, the Government argues that the information it seeks to protect “goes beyond” the
19 known fact that the government can and does track individuals using CSS and instead provides
20 “particularized detail on what tactics and factors DOJ attorneys take into account in deciding
21 whether, how, and when to use CSS—information that could assist unlawful actors in evading
22 detection.” Gov. Reply at 7. However, several courts, including this one, have found inadequate
23 an agency’s conclusory assertions that Exemption 7(E) protects specifics about how and when the
24 technique at issue is used if the technique itself is otherwise generally known to the public. *See*
25 *Rosenfeld*, 57 F.3d at 815 (holding that the government “simply by saying that the ‘investigative
26 technique’ at issue is not the practice but the application of the practice to the particular facts
27 underlying that FOIA request” cannot be adequate under Exemption 7(E) because otherwise it
28 would prove too much); *Am. Civil Liberties Union v. FBI*, 2013 WL 3346845, at *9 (N.D. Cal.

1 July 1, 2013) (“The FBI’s conclusory assertion that, even though the technique is generally
2 known, the specifics on how and when the technique is used is not generally known, is not
3 adequate.”); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 787 (N.D. Cal. 1997) (rejecting Exemption 7(E)
4 withholding where government failed to “provide non-conclusory reasons why disclosure of each
5 category of withheld documents would risk circumvention of the law.”); *ACLU I*, 2014 WL
6 4954277, at *15 (Exemption 7(E) unavailable where declarations “set forth only conclusory
7 statements that the public is not aware of the specifics of how or when the techniques are used, but
8 do not state that the techniques are not generally known to the public.”). This is not to suggest a
9 categorical exception to Exemption 7(E); in other words, the fact that the technique is generally
10 known will not make specific applications of that technique or procedure always subject to
11 disclosure. But the Government cannot rely on conclusory assertions to show that release of the
12 withheld information risks circumventing of the law. “Exemption 7(E) requires that the agency
13 demonstrate logically how the release of the requested information might create a risk of
14 circumvention of the law.” *Am. Civil Liberties Union v. FBI*, 2014 WL 4629110, at *11 (N.D.
15 Cal. Sept. 16, 2014) (citing *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)).

16 The ACLU has put forward substantial evidence—including evidence the DOJ itself had
17 made public—that the techniques and procedures relating to the use of cell site simulators is
18 generally known to the public. *See* Lye Decl., Ex. 1 (Electronic Surveillance Issues) at 151, 153;
19 Ex. 2 (Electronic Surveillance Manual) at 40⁷, 48; Ex. 4 (Electronic Surveillance Manual Chapter
20 XIV, dated August 21, 3013, entitled “Cell Site Simulators/Digital Analyzers/Triggerfish”). CSS
21 and its use by the federal government has also been the subject of extensive news coverage. Lye
22 Decl. ¶¶ 12, 13, & Exs. 6-7 (dozens of news articles about the government’s use of CSS). The
23 public domain evidently contains enough information about the technology behind CSS that
24 members of the public have actually created their own CSS devices. Lye Decl. ¶ 16, Ex. 10. This
25 evidence demonstrates that the public in general knows that the government possesses and utilizes
26 such cell phone technology in its investigations to locate and obtain information about the cell-
27

28 ⁷ *See* Dkt. No. 48 for page 40 of the Electronic Surveillance Manual.

1 phone holder. The Government has not distinguished this case from *ACLU I*, for instance by
2 addressing “the fact that the public is already aware that minimizing vehicular or cell phone usage
3 will allow them to evade detection.” *ACLU I*, 2014 WL 4954277, at *14. Thus, as in *ACLU I*,
4 “[t]o the extent that potential law violators can evade detection by the government’s location
5 tracking technologies, that risk already exists.” *Id.* And for that matter, the ACLU has presented
6 evidence that the public already has tools that can detect CSS. Lye Decl. ¶ 17, Ex. 11.

7 Of course, that is not to say that the mere existence of an already present risk or threat to
8 effectiveness of the Government’s investigative techniques is enough, alone, to make Exemption
9 7(E) inapplicable. However, where, as here, the Government provides only conclusory statements
10 showing no distinct risk associated with the disclosure of documents it seeks to withhold,
11 application of Exemption 7(E) is improper. *Rosenfeld*, 57 F.3d at 815 (“It would not serve the
12 purposes of FOIA to allow the government to withhold information to keep secret an investigative
13 technique that is routine and generally known.”); *compare Bowen*, 925 F.2d at 1228-29
14 (government may withhold detailed information regarding a publicly known technique where the
15 public disclosure provides “a technical analysis of the techniques and procedures used to conduct
16 law enforcement investigations.”); *Asian Law Caucus*, 2008 WL 5047839, at *4 (while use of
17 watchlists to screen travelers was a matter of common knowledge, government could withhold
18 information about the operation of those lists, which was not generally known or understood by
19 the public). Unlike *Bowen* and *Asian Law Causus*, the Government has not provided any
20 indication, other than conclusory statements, that the withheld documents contain information that
21 “goes beyond” what is already generally available to the public. The Government bears the
22 burden of demonstrating that the material is exempt from disclosure, but its current evidence—
23 including the supplemental declaration ordered by the Court and the *in camera* documents—fails
24 to provide the necessary support to meet its burden. *See Maricopa Audubon Soc’y*, 108 F.3d at
25 1092 (“To meet its burden, the agency must offer oral testimony or affidavits that are ‘detailed
26 enough for the district court to make a de novo assessment of the government’s claim of
27 exemption.’” (citation omitted)). Even reviewing these documents *in camera*, the Court cannot
28 say that they reveal more than what is generally available to the public or that they risk

1 circumvention of the law such that the application of Exemption 7(E) is required.

2 2. Email Withheld Under Exemptions 5, 6, and 7.

3 The Government also argues that it properly withheld the following document:

4 • **CRM-Lye-17543-17544**, “an email message dated August 22, 2012 from an ESU attorney
5 to another Criminal Division attorney containing the Criminal Division’s legal advice on
6 how law enforcement may use its own equipment to obtain location information for a
7 particular wireless device.” Third Sprung Decl. ¶ 15. “The email describes the
8 technology, what type of legal process is necessary, and what type of information the
9 device can gather.” *Id.* The government withheld the email under the attorney work
10 product, the deliberative process, and the attorney-client privileges of Exemption 5, as well
11 as Exemptions 6 and 7(C). *Id.*

12 The *Vaughn* Index describes this document as “**EMAIL. Subject:** N/A **Re:** Attached description
13 and guidance on how cell site simulators and related technologies are utilized and implemented by
14 law enforcement.” *Vaughn* Index at 134, Dkt. No. 35-7; Jt. Stmt. at 21. While the Government
15 contests release of this document under several exemptions, it also acknowledges that the
16 document “excerpts test of a document in the public domain, which has been released to Plaintiff.”
17 Third Sprung Decl. ¶ 15.

18 Theoretically what remains for this Court’s review is the non-public portion, but it is not
19 evident which portion of the document the Government has continued to withhold. For clarity, the
20 Government shall file a declaration following this Order indicating which portion of the document
21 is non-public and presently withheld. The Court will issue an order regarding this email following
22 its review of that declaration.

23 **C. USA Book**

24 The Government describes withheld document CRM-Lye-2541 as a page from USA Book
25 on cell site simulators, Triggerfish, and cell phones, which “describes the underlying technology,
26 discusses the legal basis for its use, identifies certain of the unique capacities of a CSS that present
27 significant litigation risk, names the ESU attorney who is a legal expert on the subject, and
28 references other relevant DOJ legal resources.” Suppl. Sprung Decl. ¶ 26; Third Sprung Decl. ¶ 7.

1 The Index describes it as “USA Book, Electronic Surveillance, Cell Site Simulators, Triggerfish,
2 Cell Phones Re: Description of the technology.” Jt. Stmt. at 1. The Government asserts that it
3 properly withheld this document under the attorney work product of Exemption 5. Third Sprung
4 Decl. ¶ 7; Jt. Stmt. at 1.

5 The Government provides no grounds for why CRM-Lye-2541 is protectable as such.
6 First, its supporting declarations provide no indication that the material was prepared in
7 anticipation of litigation. While the Third Sprung Declaration indicates that this document
8 contains the “legal basis” for the CSS’s use, names an expert attorney on the subject, and refers to
9 legal resources, there is no indication that any part of this document was created in anticipation of
10 litigation, either current or prospective. The *Vaughn* Index itself provides little explanation other
11 than that the document contains a “description of the technology.” *See* Jt. Stmt. at 1. This does
12 not show anything connecting the document to attorney work product. Nothing in the
13 government’s evidence shows that disclosure of this page from the USA Book threatens the
14 attorney work product protection’s aim of “protect[ing] the attorney’s thought processes and legal
15 recommendations from the prying eyes of his or her opponent.” *In re EchoStar*, 448 F.3d at 1301;
16 *see also Hickman*, 329 U.S. at 508.

17 Second, having reviewed this document *in camera*, the Court finds nothing that would be
18 protected as work product. There is no indication that this page of the USA Book was prepared in
19 anticipation of litigation or that its “litigation purpose so permeates any non-litigation purpose that
20 the two purposes cannot be discretely separated from the factual nexus as a whole.” *Torf*, 357
21 F.3d at 910. The document informs government officials about the technology, its legal basis, and
22 which resources are available in the event the technology is needed, but there is nothing that
23 demonstrates this document was created in anticipation of litigation in the way the work product
24 doctrine contemplates.

25 As the Government only sought protection of this document under Exemption 5, the Court
26 cannot find that this document is entitled to exemption.

27 **D. Sealed Documents**

28 The parties’ final dispute concerns CRM-Lye-39451-39484, which contains a search

1 warrant issued by the U.S. District Court for the Central District of California, a supporting *ex*
2 *parte* application and agent affidavit, and a sealing order authorizing the use of CSS in a particular
3 investigation. Third Sprung Decl. ¶ 6. Previously, the ACLU asserted that the “DOJ should be
4 ordered to produce the search warrant and supporting application and affidavit unless it submits a
5 declaration averring that the investigation at issue remains active.” Pl. Reply at 14. The
6 Government’s latest declaration states that “the underlying investigation has concluded and that
7 none of the subjects of the investigation were charged.” Third Sprung Decl. ¶ 6. Nevertheless, the
8 matter “remains under seal.” *Id.* According to the Government, “[t]he documents were properly
9 withheld because the language of the sealing order indicates that it was intended to preclude
10 disclosure while the seal remains in effect and therefore the DOJ has no discretion to release the
11 documents in this matter.” *Id.*⁸

12 “[T]he mere existence of a court seal is, without more, insufficient to justify nondisclosure
13 under the FOIA. Instead, only those sealing orders intended to operate as the functional equivalent
14 of an injunction prohibiting disclosure can justify an agency’s decision to withhold records that do
15 not fall within one of the specific FOIA exemptions.” *Concepcion v. FBI*, 699 F. Supp. 2d 106,
16 111 (D.D.C. 2010) (quoting *Morgan v. United States*, 923 F.2d 195, 199 (D.C. Cir. 1991)); *cf.*
17 *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 387 (1980). The agency
18 bears “the burden of demonstrating that the court issued the seal with the intent to prohibit the
19 [agency] from disclosing the [document] as long as the seal remains in effect.” *Id.* (quoting
20 *Morgan*, 923 F.2d at 198 (alterations in original)). The Government can demonstrate intent
21 through “(1) the sealing order itself; (2) extrinsic evidence, such as transcripts and papers filed
22 with the sealing court, casting light on the factors that motivated the court to impose the seal; (3)
23 sealing orders of the same court in similar cases that explain the purpose for the imposition of the
24 seals; or (4) the court’s general rules or procedures governing the imposition of seals.” *Morgan*,
25 923 F.2d at 198 (footnote omitted).

26
27

⁸ The Government does not assert that these documents contain materials covered under the Pen
28 Register Statute (18 U.S.C. § 3123(d)) or Title III (18 U.S.C. § 2518(8)(b)).

1 Having reviewed the sealing order itself,⁹ the Court finds that there is no evidence that it
2 was intended to operate as the functional equivalent of an injunction. The sealing order was
3 originally a proposed order submitted by the Government and adopted and signed by the court. It
4 provides that the document is kept under seal until the Government notifies the court that it is
5 appropriate to unseal the documents. Accordingly, the Government's assertion that the court
6 intended the documents to remain sealed is inconsistent with the Order that for all intents and
7 purposes allows the Government to decide when to unseal those documents.

8 Additionally, as the Government admits that the investigation related to these materials has
9 concluded, the common law right of access applies. *See United States v. Bus. of Custer Battlefield*
10 *Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1194
11 (9th Cir. 2011) (holding that "the public has a qualified common law right of access to warrant
12 materials after an investigation has been terminated."). "When the common law right of access
13 applies to the type of document at issue in a particular case, a 'strong presumption in favor of
14 access' is the starting point" and the party seeking to restrict access to the document "bears the
15 burden of overcoming this strong presumption by . . . 'articulat[ing] compelling reasons' . . . that
16 outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1194-95
17 (citations and internal marks omitted). The Government has not argued that any such compelling
18 reasons exist as to why maintaining the secrecy of these documents outweighs the public policy
19 favoring disclosure.

20 However, the Government has raised concerns that these documents "contain the names
21 and other personal information about the subjects, as well as personal information about the
22 prosecutor and agent and a third party/witness victim." Third Sprung Decl. ¶ 6. As such, the DOJ
23 asserts that the documents are properly withheld under Exemption 6 and Exemption 7(C). *Id.*

24 Exemption 7(C) permits withholding of "records or information compiled for law
25 enforcement purposes" to the extent that their production "could reasonably be expected to
26 constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Such

27
28 ⁹ The Court reviewed only the sealing order, not any of the related documents.

1 information is protected from disclosure unless “the public interests in disclosing the *particular*
2 information requested outweigh those privacy interests.” *Yonemoto*, 686 F.3d at 694 (emphasis in
3 original). Exemption 6 is similar but distinct from Exemption 7(C); specifically, Exemption 6
4 provides that an agency may withhold “personnel and medical files and similar files the disclosure
5 of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. §
6 552(b)(6); *see Yonemoto*, 686 F.3d at 693 n.7. The Court is thus required “to protect, in the proper
7 degree, the personal privacy of citizens against the uncontrolled release of information.” *Lane v.*
8 *Dep’t of the Interior*, 523 F.3d 1128, 1137 (9th Cir. 2008). The Court must “balance the public
9 interest in disclosure against the [privacy] interest Congress intended the Exemption to protect.”
10 *Reporters Comm.*, 489 U.S. at 776; *Forest Servs. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524
11 F.3d 1021, 1025 n.2 (9th Cir. 2008).

12 The Government’s arguments do not support that Exemption 6 or 7(C) should be used to
13 withhold these documents in their entirety. Rather, the more appropriate solution under these
14 Exemptions is to disclose the documents and redact the personal information of the persons
15 described in those documents. Accordingly, the Government will produce the documents at
16 CRM-Lye-39451-39484, redacted in accordance with this Order.

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

CONCLUSION

Based on the analysis above, the DOJ's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART** and the ACLU's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. The Government properly withheld under Exemption 5 the following documents: (1) EOUSA Docs. #3 and #4; (2) Criminal Division internal memoranda, CRM-Lye-2948; CRM-Lye-9853-9897; CRM-Lye-34065-34066; CRM-Lye-15311-15316; CRM-Lye-19179-19184; and (3) Criminal Division templates, CRM-Lye-9002-9010; CRM-Lye-9011-9019; CRM-Lye-00015173-00015181; CRM-Lye-00015200-00015207; CRM-Lye-00031754-00031777; CRM-Lye-00038268-00038270. However, the Government must produce CRM-Lye-39451-39484 (sealing order, warrant, and application); CRM-Lye-2541 (USA Book); CRM-Lye-3818-3825, CRM-Lye-23249-23256, CRM-Lye-33358-33365, and CRM-Lye-28119-28126 (internal memoranda). The Government must also file a declaration by June 24, 2015, indicating which portion of CRM-Lye-17543-17544 (email) is non-public and presently withheld.

IT IS SO ORDERED.

Dated: June 17, 2015


MARIA-ELENA JAMES
United States Magistrate Judge